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Supreme Court, U.S.
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No. 97-261

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

TERRY DILLON, *et al.*,

Petitioners,

v.

NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT, GERALD HANAS, NIPPON SHARYO KAISHA, LTD., SUMITOMO CORPORATION, LOUIS T. KLAUDER & ASSOCIATES, WILLARD BLEWETT and DAVID RIORDAN,

Respondents.

On Petition for Writ of Certiorari to the Indiana Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. HARRIS
HARRIS, WELSH & LUKMANN
107 Broadway
Chesterton, Indiana 46304
(219) 926-2114

THOMAS H. FEGAN, JR.
Counsel of Record
ROBERT M. BURKE
JOHNSON & BELL, LTD.
222 N. LaSalle St., Suite 2200
Chicago, Illinois 60601
(312) 372-0770

Attorneys for Respondents
NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT and GERALD HANAS

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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Respondents, the Northern Indiana Commuter Transportation District (hereinafter "NICTD"), and Gerald Hanas, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the Indiana Court of Appeals entered in the above proceeding on September 11, 1996, which the Indiana Supreme Court declined to review on May 9, 1997.

REASONS PETITION SHOULD BE DENIED

The Indiana Court of Appeals correctly held that this case, involving a commuter train accident,[1] "is analogous to a typical tort claim for negligence" (Op. p. 11) and thus is the type of suit "traditionally governed by tort principles" (Op. p. 6). Accordingly, petitioners have been allowed to proceed with their negligence actions against NICTD, and they have done so. Petitioners, however, were not satisfied with their negligence remedy against NICTD. Thus, they subsequently sought to plead both a constitutional civil rights claim under 42 U.S.C. § 1983

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[1] Although not relevant to the issues here, NICTD disagrees with and takes strong exception to the factual allegations contained in petitioners' statement of the case. Some of the more inflammatory accusations in the petition, *e.g.*, petitioners' assertion that the train engineers accelerated their trains "in a futile attempt to beat each other across the gauntlet" are blatantly false and not alleged in any pleading. Equally untrue is petitioners' claim that the State of Indiana provided NICTD with 100% subsidy of the commuter passenger train service. (Petition at 11.) The primary source of revenue relative to NICTD passenger train service has always been and remains ticket sales.

and a strict liability action against NICTD and additional defendants who manufactured the locomotives involved in the accident.

The Indiana Court of Appeals properly rejected both claims and the Indiana Supreme Court declined review. This Court should do the same for the following reasons:

1. The Boiler Inspection Act, at issue in this litigation, regulates a field which Congress has totally occupied for well more than half a century. The regulation of interstate railroad locomotive equipment is not a field traditionally occupied and governed by the States. To the contrary, Congress' intent to totally occupy the field of locomotive equipment regulation and thereby to preempt state regulation of such equipment has been clear and well-settled since this Court's decision in *Napier v. Atlantic Coastline R.R.*, 272 U.S. 605, 47 S. Ct. 207 (1926). The Boiler Inspection Act is not analogous to the Medical Device Amendments at issue in the *Medtronic* case, and, therefore, the recent *Medtronic* analysis does not warrant review of the longstanding rule that Congress has totally occupied the field of locomotive equipment regulation.

2. Petitioners' attempt to convert this state law tort action into a constitutional civil rights claim under Section 1983 was correctly rejected by the Indiana courts. Plaintiffs acknowledge "the general rule that government owes no duty under the Due Process Clause to protect its citizens from danger" (Petition at 10). Petitioners' further discussion concerning the interpretations and nuances of the so-called "state-restricted alternatives" and "state-created danger" exceptions to this no duty rule are an academic exercise in this case. No court has ever applied

these exceptions to facts analogous to those in the case at bar. Thus, this case presents no reason or need for clarification on this or any other issue.

Based upon the foregoing, the well-reasoned judgment of the Indiana Court of Appeals and the denial of the petition for transfer by the Indiana Supreme Court are sound decisions, and no further review of this case is warranted.

I.

THE *MEDTRONIC* DECISION IS INAPPOSITE TO THE INSTANT CASE WHICH IS CONTROLLED BY THIS COURT'S DECISION IN *NAPIER*.

The preemption issue in this case was decided by this Court in *Napier v. Atlantic Coastline R.R.*, 272 U.S. 605, 47 S. Ct. 207 (1926) wherein this Court held that Congress' enactment of the Boiler Inspection Act, 45 U.S.C. §§ 22-29, 31-34 (recodified at 44 U.S.C. § 20701 *et seq.*), was intended to occupy the field of interstate railroad locomotive equipment regulation:

> We hold that *state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.* The broad scope of the authority conferred upon the [Interstate Commerce] Commission leads to that conclusion. Because *the standards set by the Commission must prevail, requirements by the states are precluded*, however commendable or however different their purpose.

Id. at 613, 47 S. Ct. at 210 (emphasis added).

The *Napier* decision and the long history of its consistent application are dispositive of the preemption issue

raised herein. Numerous federal courts have applied and followed the *Napier* decision and have repeatedly rejected state courts' attempts to regulate locomotive equipment through both legislation and state tort actions. *See Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 56 S. Ct. 504 (1936); *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997); *Marshall v. Burlington Northern Inc.*, 720 F.2d 1149 (9th Cir. 1983); *Eldridge v. Missouri Pac. R.R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Waller v. Southern Pac. Co.*, 37 F. Supp. 475 (N.D. Cal. 1941); *Missouri Pacific R.R. v. Railroad Comm'n of Tex.*, 850 F.2d 264 (5th Cir. 1988); *Springston v. Consolidated Rail Corp.*, 863 F. Supp. 535 (N.D. Ohio 1994).

As the *Springston* court cogently explained, Congress intended to provide a nationally uniform standard of regulating locomotive equipment, and to allow the states to require additional or different equipment, through state tort law actions, would frustrate that Congressional intent:

> [T]o allow plaintiff's state tort claims to stand would result in requirements of reflective material, oscillating, strobe and/or ditch lights on locomotives. Such lights are additional requirements on locomotives, even if they are aimed at a different evil than are headlights. As the *Napier* Court found, the BIA is preemptive of any state or local regulation on the same subject. Accordingly, pursuant to the reasoning set forth in *Napier*, plaintiff's state law negligence and product liability causes of action are preempted . . . . It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such

> items as reflective materials, oscillating, strobe and ditch lights, such goal would be compromised.

Springston v. Consolidated Rail Corp., 863 F. Supp. at 541.

Certainly, if *Napier* and its progeny did not comport with Congress' intent, Congress would have acted to correct the misconception in the 70-plus years since *Napier* was decided. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 112 S. Ct. 560 (1991) (Court's prior interpretation of legislation upheld where Congress had 30 years to correct prior decision if it disagreed with it).

Contrary to petitioners' contention, this Court's decision in *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240 (1996), does not change the holding in *Napier* or any of the preemption principles applicable to the locomotive equipment involved herein.[2] *Medtronic* did not involve the Boiler Inspection Act or locomotive equipment. Rather, it involved the preemptive effect of the "Medical Device Amendments." The opinion noted that the Court's analysis must ultimately focus on the purpose and intent of Congress, which is the ultimate touchstone in every preemption case. *See Medtronic* at 2250, citing *Cipollone v. Ligget-Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608 (1992).

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[2] Petitioners imply that the Indiana courts of review did not have the benefit of the decision in *Medtronic*. (Petition at 5.) This is not so. The *Medtronic* case was discussed by the parties in their briefs in support of and in opposition to the petition for rehearing in the Court of Appeals and in support of and in opposition to the petition to transfer to the Indiana Supreme Court.

In deciding *Medtronic* and in attempting to ascertain the intent of Congress, this Court made particular note of the fact that Congress is presumed not to intend to preempt state law causes of action in fields which the states have traditionally occupied. *Medtronic* at 2250. The regulation of interstate railroad locomotive equipment is not such a field. Obviously, nothing in *Medtronic* or the Federal Medical Device Act, 21 U.S.C. § 360(e)(2), changes any aspect of the Boiler Inspection Act or this Court's interpretation of the Act uniformly followed for the last 70 years.

The majority opinion repeatedly cited *Cipollone* with approval, noting that the Court's primary function in any preemption analysis is to ascertain Congressional intent as to the particular legislation and field to be regulated. Thus, petitioners' perceived inconsistencies between *Medtronic* and this Court's decision in *Cipollone v. Ligget-Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608 (1992), present no issue worthy of review in this case involving locomotive equipment as all regulation of such equipment has traditionally been governed, according to *Napier* and its progeny, by the Boiler Inspection Act. Moreover, at least five members of the Court in *Medtronic* (Justices Breyer, O'Connor, Rehnquist, Scalia and Thomas) reaffirmed that where federal law preempts the field, preemption applies not only to state legislation but also to state tort law actions as well. *See Medtronic* at 2260, 2264.

In short, this case presents no preemption issue worthy of this Court's review.

II.

THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' ATTEMPT TO CONVERT A STATE TORT LAW ACTION INTO A CONSTITUTIONAL CIVIL RIGHTS CAUSE OF ACTION UNDER SECTION 1983.

The Indiana Court of Appeals correctly refused to recognize a 42 U.S.C. § 1983 cause of action arising from the subject train collision because the alleged wrong committed by the governmental entity here involved was the type traditionally governed by state tort law principles, citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 12 S. Ct. 1061, 1069 (1992). (Petition at B 13.) The Indiana Court of Appeals reasoned:

> Dillon's complaint also is analogous to a typical tort claim for negligence. Although 42 U.S.C. § 1983 was designed to compensate injured plaintiffs for deprivation of federal rights by state actors, it was not intended to supplant state tort law by providing a remedy for every wrong. (Cite omitted.) A state tort does not become a constitutional violation simply because it is committed by a government actor. (Cite omitted.) Dillon may proceed on the negligence claim contained in Count I of his complaint; however, the trial court properly dismissed the § 1983 claim contained in Count II.

(Petition at B13.)

The Indiana Court of Appeals' analysis comported with this Court's holding in *Collins* that the Due Process Clause is not to be used to impose federal duties on state or local governments relative to causes of action which are traditionally governed by state law:

> Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society" (cite omitted), we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law . . . . Decisions concerning the allocation of resources to individual programs, such as sewer maintenance, and to particular aspects of those programs, such as the training and compensation of employees, involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country. The Due Process Clause "is not a guarantee against incorrect or ill-advised personnel decision" (*Bishop v. Wood*, 426 U.S. at 350, 96 S. Ct. at 2080). Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Collins, 503 U.S. at 128-29.

The So-Called "Exceptions" Argued By Petitioners, No Matter How Interpreted, Have No Application To The Facts At Bar.

In an attempt to obtain review, petitioners engage in an academic discussion of the so-called "state-created danger" and "state-restricted alternatives" exceptions to the general rule that "a government owes no duty under the Due Process Clause to protect its citizens from danger" (Pl. Pet. p. 10). Petitioners' discussion of these exceptions and the cases interpreting them is futile.

Even cases with the broadest interpretation of these exceptions do not come close to justifying their application to the case at bar. Indeed, both of the cases cited by petitioners as cases purportedly rejecting these exceptions did not reject them at all; they simply hold that, as here, the facts involved did not support application of the exception. *See, e.g., Mark v. City of Hato.ro*, 51 F.3d 1137 (3d Cir. 1995);[3] *Dorothy J. v. Little Rock School District*, 7 F.3d 729 (8th Cir. 1993). Likewise, the cases cited by petitioners applying these exceptions—involving a town clerk who was abducted and terrorized by an inmate, a nurse raped by a violent known sex offender, and police officers who conspired to beat up demonstrators—only highlight the inapplicability of these exceptions to the facts at bar. (Petition at 15-16.)

The only recent Circuit Court decision factually analogous to the instant case is that cited by the Indiana Court of Appeals, *Searles v. Southeastern Pa. Transp. Auth*, 990 F.2d 789 (3d Cir. 1993) wherein plaintiffs brought an action against Southeastern Pennsylvania Transportation Authority (SEPTA) for injuries sustained when one of SEPTA's railcars derailed. As here, plaintiffs attempted to convert this traditional tort action into a § 1983 action by alleging that SEPTA was a governmental entity engaged in the policy or custom of following grossly negligent maintenance, inspection and repair

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[3] In fact, the Third Circuit has since recognized, that under the proper facts, it will recognize the "state-created danger" exception. *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996). There, the court again noted that the facts involved in previous Third Circuit cases did not support application of the exception.

policies in reckless disregard for the safety of the public and with indifference to the rights of others. *See id.* at 790. Affirming the court's dismissal of the § 1983 action, the Third Circuit relied on *Collins*, concluding that plaintiffs' allegations were "analogous to a fairly typical state law tort claim" and did not rise to the level of a constitutional violation.[4] *Id.* at 791. The Indiana Court of Appeals, also relying on *Collins*, properly reached the same conclusion here, and there is no need or reason for this Court's review.

CONCLUSION

The decision in the case at bar by the Indiana Court of Appeals was correct and in complete accord with this Court's prior decisions regarding preemption and causes of action under 42 U.S.C. § 1983. Petitioners' claims regarding the need for further review are without merit in this case.

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[4] The petitioners' citation to *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), in support of the "state-restricted alternatives" exception is totally off the mark. The Seventh Circuit in *Archie* refused to apply the exception. Further, the dicta language cited by petitioners (Petition at 10-11) has no application here where alternate modes of transportation to that provided by NICTD were readily available, and NICTD was created precisely because private rail services had failed and would no longer provide commuter service between Indiana and Illinois.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS H. FEGAN, JR.
Counsel of Record
ROBERT M. BURKE
JOHNSON & BELL, LTD.
222 North LaSalle Street
Suite 2200
Chicago, Illinois 60601
(312) 372-0770

MICHAEL C. HARRIS
HARRIS, WELSH & LUKMANN
107 Broadway
Chesterton, Indiana 46304
(219) 926-2114

Attorneys for Respondents
NORTHERN INDIANA COMMUTER TRANSPORTATION DISTRICT and GERALD HANAS